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Comments On Security Programs Of Foreign Air Carriers 14 CFR Part 129

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PROFILING

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My name is Kamal Nawash and I am the Legal Director of the American-Arab Anti-Discrimination Committee (ADC). ADC is a non-sectarian, non-partisan organization dedicated to protecting the civil rights of Americans of Arab descent. ADC was founded in 1980 by former Senator James Abourezk to combat racism, discrimination, and stereotyping of Arabs and Americans of Arab descent. I appreciate the opportunity to submit this statement on behalf of the American Arab Anti-Discrimination Committee (ADC) about aviation security profiling.

We are here today because the FAA proposes to amend the existing airplane operator security rules for foreign air carriers and foreign operators of U.S. registered aircraft. The proposed rule would implement provisions of the Antiterrorism and Effective Death Penalty Act of 1996. In essence this proposed regulation would require that the security programs of foreign air carriers adhere to the identical security measures required of U.S. air carriers serving the same airports.

Because the use of profiling plays a significant role among the security methods used by U.S. air carriers, it will likely be required of foreign air carriers. This is the primary security method that I will focus on today. I will focus on the use of profiling because there is no evidence that it is an effective security method while there is substantial evidence that it facilitates racism.

It has been almost three years since the Gore commission instituted the profiling system for the purpose of enhancing airline security. Three years ago the ADC, ACLU and other civil rights organization warned that profiling does not enhance security but does substantially violate civil liberties. At that time however, those warnings were considered mere speculation. Today, we need not speculate. Three years since the institutionalized use of profiling, there is no evidence that the use of profiling in any way enhances security. Even the FAA admits that there is no way that it can determine if the methods used in fact do enhance security. This admission appears on pages 23 and 24 of this proposed regulation. There is substantial evidence however, that certain ethnic

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groups are targeted due to stereotype. In fact, the use of profiling has had such a negative effect on Americans of Arab descent that many now fear flying because of the humiliation they may encounter. One lady that was the victim of profiling told me that "the only thing more humiliating than a stranger going through my underwear is having every passenger in the plane stare at me as if I were a terrorist." I myself was profiled *four* times. I am now so apprehensive of approaching an airline teller that I wait until everyone else passes before I approach the counter. It is absolutely horrible to be pulled aside in front of everyone for a more comprehensive search.

Because the American Arab community has been the primary victim of airline profiling, ADC has developed substantial expertise on the issues of airline security and passenger profiling. For this reason I urge you to pay close attention to my comments.

In the past three years hundreds of Arab American have complained of discrimination by the various airline carriers. The surge in anti-Arab discrimination at air ports is directly linked to the adoption of a passenger "profiling" system. Profiling, which is designed to select suspect individuals most likely to commit an act of terrorism, is essentially based on stereotype and racism.

Following the TWA Flight 800 crash, theories abounded about a terrorist bomb as a cause of the crash, and Arabs and Muslims became the targets of unfounded speculation. As in the case of Oklahoma City and the Atlanta Olympic bombings, this rush to judgement by the media, some officials, and "terrorism "experts," proved erroneous. Nonetheless, the White House Commission on Aviation Safety and Security chaired by Vice-President Al Gore instituted a "profiling" system of airline security which has a desperate impact on Arabs and Muslims. The policies recommended by the Gore Commission are now being implemented by the Federal Aviation Administration (FAA), as well as domestic and foreign airlines. These policies have resulted in the singling out and humiliating Arab-American travelers solely based on their national background and ethnicity.

The profiling of airline passengers is generally performed by airline personnel during check-in, as well as at the department gate before boarding. When a traveler is selected, he or she is subjected to greater scrutiny than other passengers, including questioning, interrogation, and intrusive searches, most often item-by-item hand-searches conducted in public view.

Airlines claim confidentiality for not releasing profiling criteria. Neither



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the airline or the FAA take responsibility for the ethnic bias and discrimination involved in the profiling system. When a passenger complains to an airline that he or she was treated unfairly, the airlines typically respond that they are simply applying standards imposed by the FAA. In turn, the FAA contends that the airlines misinterpret and misapply their “non-biased” and “non-discriminatory” criteria for profiling. The FAA however, has not been able to give a legitimate reason as to why it is that Arab Americans are the primary victims of the mis-interpretation and misapplications by the airlines. In the meantime, Arab-American victims of discrimination at airports find themselves with little recourse for action when the FAA and the Airlines each deny responsibility for the negative impact of the profiling system.

Several airline manuals explicitly list ethnic traits in their profiling system. Specifically, they direct airline security and check-in personnel to profile passengers with Arabic names; passengers born in an Arabic country; as well as passenger traveling to or from the Middle East. Although there may be additional criteria used in profiling, the presence of Middle East identifiers, such as Arab national origins and Arabic names, indicate that the profiling system is discriminatory.

It is important to note here that the United States has specific statutes that prohibit discrimination based on race, ethnicity and other protected classifications. Nonetheless, the outcome of the FAA airlines security rules, such as profiling, clearly targets Arab Americans disproportionately than other Americans. Now the FAA wants to require foreign air carriers to adopt rules that are identical to those enacted by the FAA. The FAA’s proposed regulation would not allow foreign air carriers to provide less security that the FAA requires but would allow them to exceed FAA regulations. This right, to exceed FAA security regulations, will spell disaster for the American Arab community. It is clear that certain airlines such as El Al of Israel discriminate based on race and ethnicity. This type of discrimination could be justified by stating that FAA regulations allow foreign carriers to exceed FAA security regulations and that profiling based on race and ethnicity enhances security.

There is nothing in the proposed regulation that prohibits foreign carriers from discriminating based on race or ethnicity. The end result of this regulation is that foreign carriers will target and discriminate against Arab Americans. Further, there will be no recourse for victims of discrimination. Foreign air carriers will blame the FAA and the FAA will blame foreign air carriers. This is already happening. Many Arab Americans who are targeted and discriminated against abroad are being told by foreign airline personnel that they are acting pursuant to “American” demands. They are also being told that they were targeted



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because they are Arab. Therefore, we need not speculate as to whether foreign air carriers will interpret FAA regulations as a license to target Arab Americans, it is already happening. The FAA regulation will merely codify and legitimize the use of racism under the guise that air travel is being made safe for everyone.

What makes the present FAA airline security regulations even more troubling is that the FAA has no evidence that its regulations are effective in reducing terrorism.. In essence the FAA is taking a big bite out of civil liberties without any quantified benefit(s) in return.

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Three years of experience has shown that profiling is not an advance in aviation security. It is a retreat. Passenger profiling will not stop bombings of airlines. It is proposed to make passengers feel that something has been done to prevent such crimes. A policy of discrimination and invasion of privacy, however, simply will not work.

Nobody believes more strongly than I, or more strongly than does the ADC, that air travel must be safe. Our employees and members tend to fly more often than does the general public. Nobody, least of all our members, wants to feel that to set foot on an airplane or in an airport is to take a substantial risk. I want my mother to know that when she sees me off at the gate, she'll see me back home in one piece.

To the credit of many in the airline industry, including many people at this conference, air travel is in fact the safest form of travel today. That does not mean that it cannot be safer.

Nor does it mean that civil liberties must be sacrificed for the cause of safety. Some basic principles would serve to help focus airport security efforts on actually improving safety, instead of on measures that would infringe on civil liberties but not enhance safety:

First, passengers should not be detained, questioned and searched as if they are potential criminals, unless specific facts specific to them indicate that they may commit a criminal act.

Second, no passenger should be singled out for heightened security measures on the basis of their perceived or actual race, religion, national origin, gender, sexual orientation, political opinion, or upon their exercise of a constitutionally protected right, such as the right to travel.



Third, passengers not legitimately under suspicion should not have to fear that their private effects and private lives will be held up to public scrutiny, or that personal data about them will be made accessible to others without their fully-informed, and genuinely non-coerced consent.

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The Fourth Amendment to the U.S. Constitution provides that people and their property shall not be subjected to unreasonable searches and seizures. It requires that warrants issued to support a search or seizure must be based upon probable cause of criminality. The Fourth Amendment is the cornerstone of personal privacy in the U.S. The Supreme Court's holdings on the Fourth Amendment has created a sliding scale: when there is no suspicion of criminality, no intrusion will satisfy its requirements; as evidence of criminality increases, progressively more intrusive investigation is warranted. For example, the U.S. Supreme Court has held that when a police officer has only a reasonable articulable suspicion of criminality, but not probable cause, the police officer *cannot* conduct a full search of a person, but can stop the person and conduct a *limited* pat down, but only to ensure the safety of the officer and others nearby.

Another principle of privacy is the notion that personal information about an individual will not be used for purposes other than for the purpose for which it was originally given, without the informed and genuinely non-coerced consent of the person to which it pertains. Likewise, the exercise of a constitutionally-protected right, like travel, should not be contingent on the sacrifice of another constitutionally-protected right, like privacy.

While courts have endorsed administrative searches in airports without a court order based on probable cause of crime, there are limits to this doctrine. These limits revolve around the risk to be avoided, the invasiveness of the search, the opportunities the passenger has to avoid embarrassment, and the stigma that attaches to the search when it is done selectively.

Many of the aviation security measures used by the FAA clearly fall outside of the administrative search rubric because they are more embarrassing, stigmatizing and intrusive than the searches currently permitted by the doctrine. If checked luggage is searched, passengers will no longer be able to avoid embarrassment by putting personal items in checked, as opposed to their carry-on luggage. The stigma attached to the search will increase when other passengers see that a handful of passengers have been selected as potential terrorists by the computer for heightened security measures, particularly when the selectees are required to open luggage they have already checked for their flight.



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The airport is not a no-privacy zone. The Fourth Amendment is fully applicable, as are the other principles of privacy. People have an expectation of privacy in the contents of their baggage, in what they have in their pockets and under their clothing, and in the personal information about them.

Profiling Does Not Work

From a security perspective, profiles are notoriously under inclusive. Those who do not fit the profile are given only cursory attention or no attention at all. Yigal Amir, the man who assassinated Israeli Prime Minister Rabin, did not fit the profile of a terrorist and was therefore allowed unwarranted access to the Prime Minister. Similarly, what terrorist profile would have picked up the seminary student returning to his studies from a visit to his mother who was detained by law enforcement officers in Florida a couple of years ago when he tried to board an airplane with an assortment of weapons that included hand grenades?

The first recorded bombing of a commercial plane occurred in 1949, when a woman hired assassins to kill her husband, who was on the aircraft. What profile would prevent that from recurring? The first bombing of a U.S. commercial carrier occurred in 1955, when a passenger's son arranged to have a bomb explode in a passenger's luggage so that the son could collect on an insurance policy. Did that passenger fit the profile of a terrorist?

Profiling does not work to stop hijacking. In the last period (1972) the United States used profiles to determine whose carry-on luggage would be X-rayed to stop hijacking, there were 28 hijacking of U.S. passenger aircraft anyway. Hijacking dropped off when profiling was abandoned and every passenger's carry-on luggage was X-rayed.

Profiling by the U.S. Customs Service did not work to stop the drug trade. If it did work, drugs would not be coming into the United States.

Profiles are always one step behind the bombers. The profile of potential terrorists used by El-Al, Israel's national carrier, reportedly includes young single woman traveling alone. Why? Because a bomb was planted on such a person unbeknownst to her. It is far too easy for a terrorist who fits the profile to plant the bomb on someone who does not fit the profile, or to hire such a person to plant the bomb. Under profiling schemes, these people are subjected to little or no scrutiny. The profile is



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changed to include them only after the bomb is discovered, or worse yet, detonated.

Similarly, if particular domestic flights are identified as high risk and many passengers are on those flights subjected to heightened security measures, a determined bomber will target other flights. It's like squeezing a balloon: if air is forced from one part of the balloon, it will flow to another. It makes no sense to put the squeeze on the passengers boarding some flights, and leave the others virtually unprotected.

As these examples show, there are too many possible threats to an airline for a profiling system. Because airplanes are subjected to multiple threats, many experts agree that computer-generated profiles are unlikely to enhance safety. When looking for criminal activity, there is no substitute for real evidence of the crime.

There is not enough data upon which to even develop a profile of a person who would explode a bomb on a U.S. airplane. It has only happened twice in the past 11 years to U.S. carriers, once on Pan Am 103 and once on a TWA flight near Athens in 1986. The perpetrators of the second recent bombing have not been identified. Even assuming that those accused of bombing Pan Am Flight 103 in fact did the bombing this leaves a universe of only one bombing of a U.S. passenger aircraft in the last ten years as the basis for developing an effective profile. It is not enough.

We believe that profiles offend both the U.S. Constitution and the goal of safety. Use of profiles marks a dramatic departure from the Fourth Amendment principle that a person should not be subjected to invasive investigative techniques without a criminal predicate or probable cause that is particularized to that person. Profiling that is not automated such as the profiling now done for international flights also distracts airline personnel, who instead of observing whether a person is acting in a potentially criminal manner, are trying to determine whether the person fits a behavioral profile or stereotype.

In short, instead of training security personnel to determine whether a passenger fits a pre-conceived stereotype of what a terrorist, or programming a computer to make that determination, security personnel should be trained to recognize an individual's specific activity that creates a reasonable, articulable suspicion of possible criminality that warrants further inquiry. Anything less than that is founded not on Fourth Amendment principles, but on nothing more than a stereotype.

From a civil liberties perspective, profiles are notoriously over broad.



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Profiling violates the first principle identified above: it treats people as potential criminals in the absence of facts specific to them suggesting they are likely to engage in criminal activity.

The use of such stereotypes may temporarily make people feel safer, but they will not actually increase safety and may instead decrease safety. The use of stereotypes that violate the rights of innocent people while allowing criminals to filter through are not an acceptable solution to this problem.

These profiling systems will fail. When they do, the proponents of profiling will not-admit that profiling does not work. They will insist that it needs to be improved by adding ever more personal data about passengers to the mix.

Profiles are Often Discriminatory

The most offensive profiles are those that are based on characteristics a person cannot change, or should not be forced by the government to change, and which have no causal relationship to terrorist activity: race, religion, national origin, gender, sexual orientation, or political opinion. Profiles based on these characteristics violate the first and second principles identified above: they treat potential passengers as criminals in the absence of specific evidence of individual criminality, and they treat passengers unequally.

For example, the profile used by El-Al Airlines, Israel's national carrier, reportedly discriminates based on race. According to a September 6, 1996 NBC news report and an August 6, 1996 article in the Washington Post, one of the elements of the El Al profile is a young, dark-skinned male; or 'Middle Eastern-looking' men with Western passports. El Al could probably teach other carriers a lot about security, but racial discrimination ought not be among those lessons.

A profile that uses travel to a country on the State Department's list of state sponsors of terrorism as an element will be likely to subject disproportionately Americans whose roots are in such a country to heightened security measures. Who, after all, visits Syria or Iran? These countries do not receive many American tourists. They don't get many business travelers, either, because it is a crime to engage in financial transactions with these countries and because of trade sanctions on Iran.

The Supreme Court has held that practices that have a disparate racial impact may be a violation of the Equal Protection Clause of the 14th Amendment or the Due Process Clause of the Fifth Amendment.



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Profiles tend to turn up the same innocent people time and time again. Simply put, the use of profiling erodes many of the civil rights gains the United States has made in the last century. Approximately ten years ago the United States recognized that it was mistaken in placing Japanese Americans in special camps. The use of profiling is similar in principle to the rounding up of Japanese American during WWII.

There Is No Practical Recourse For Those Who Are The Victims Of Unfair Treatment.

If a foreign carrier discriminates against or unfairly treats a passenger it would be virtually impossible for the passenger to bring legal action against the wrongdoer. When one considers the venue consideration, the choice of law, and the cost of suing, most victims of discrimination will have no way of bringing suit.

Because of the difficulty of taking legal action, foreign air carriers such as El-Al, which considers race and ethnicity as sufficient reasons for disparate treatment, will have no deterrent against blatant racial and ethnic discrimination.

Proposals

Aviation security improvements that actually enhance security need not come at the expense of civil liberties.

Security personnel should be trained to identify tangible evidence giving rise to a reasonable, articulable suspicion of criminal activity. Security personnel should not be trained to stereotype based on protected characteristics.

The FAA should make it clear to foreign air carriers that discrimination based on a protected classification is prohibited. The administrator's acceptance of a foreign air carrier's security program should be made conditional on adherence to the principle that discrimination based on a protected classification is prohibited.

The FAA should require that foreign and domestic carriers place visible signs on the airline counter that informs passengers of their rights. These signs should be accompanied with complaint forms that are to be given to an independent entity who's job is to monitor the practices of air carriers.

An entity similar to the EEOC should be created to investigate and protect against abuses by air carriers.



The FAA should create a mechanism in which lax airline *security* procedures can be reported so that when a passenger identifies a problem, they can be assured that it will be examined by a neutral third party, instead of by the airline.

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Those airline security plans subject to approval by the Federal Aviation Administration, should be required to include a complete bar to using actual or perceived race, religion, national origin, gender, sexual orientation or political opinion as an element in any profile or other scheme used to identify which passengers (or which passengers' luggage) are to be subjected to heightened security measures.

Airline security systems should be tested to ensure that they do not have discriminatory effects.

Complaints of inappropriate, discriminatory, or overly intrusive security screening measures should be tracked and reported -- like on-time performance is

-- so that passengers know which airlines and which security vendors are committing

security-related abuses, and so airlines can re-train problem agents.